2-255

Supreme Court, U. S.
FILED
AUG 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 72-255

NATIONAL AMERICAN BANK OF NEW ORLEANS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

FRED CLEGG STRONG
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New Orleans, Louisiana 70120

Attorney for Petitioner

JURISDICTION

The petition of NATIONAL AMERICAN BANK OF NEW ORLEANS, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit in the case of United States of America vs. One 1970 Buick Riviera, et al, No. 71-2545. The opinion and denial of rehearing is not yet reported, but are appended to this petition. The Judgment was entered by opinion dated May 12, 1972. On June 23, 1972, a petition for rehearing was denied with PER CURIAM comments.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS OF LAW

I. Does the District Court have subject matter jurisdiction under the Administrative Procedure Act, 5 U.S.C. 701-706, to review a decision not to remit a forfeiture to an innocent lienholder?

II. Does the District Court have subject matter jurisdiction under the Tucker Act, 28 U.S.C. 1346 (a) (2) over a counterclaim against the United States by an innocent lienholder whose property has been forfeited?

III. Is the refusal to remit or mitigate a forfeiture of the interest of an innocent lienholder under 19 U.S.C. 1618, repugnant to the Fifth Amendment for being a taking of private property for the public use, without just compensation?

LEGAL PROVISIONS

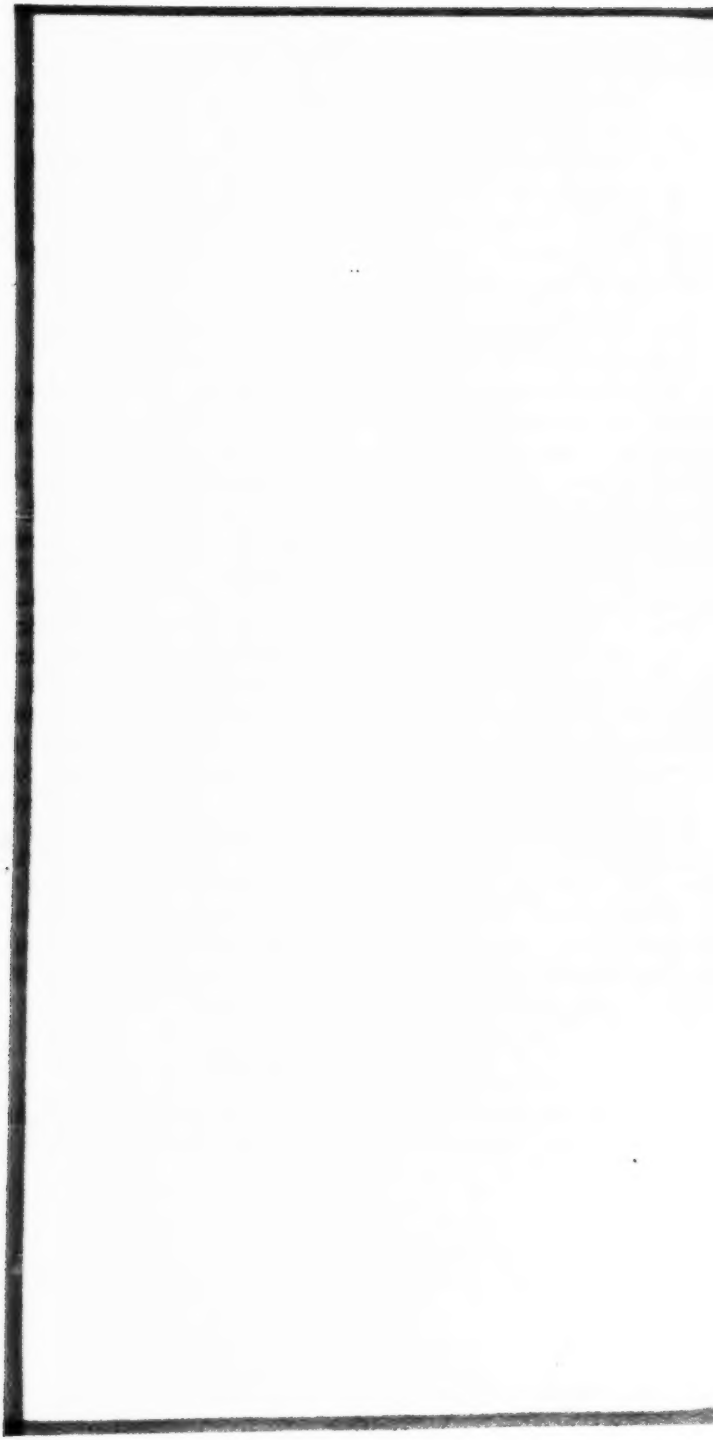
The constitutional provisions, statutes and regulations are set out verbatim in the opinion of the Court of Appeals and in a companion case BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION vs. UNITED STATES OF AMERICA, Supreme Court Docket No. 71-1640, petition for Writ of Certiorari filed June 17, 1972, which presents closely related issues.

STATEMENT OF FACTS

This is a proceeding brought by the United States pursuant to 49 U.S.C. 782 to enforce forfeiture of an automobile used to transport narcotics in violation of 49 U.S.C. 781. The NATIONAL AMERICAN BANK OF NEW ORLEANS filed a claim in the forfeiture action as holder of a chattel mortgage and vendor's lien on the car, given as security for a loan made to the owner, MRS. MYRTLE BROOKS, whose husband had used the car to transport narcotics. The Bank alleged that it was innocent of any wrongdoing, that it had duly applied to the Attorney General, under 19 U.S.C. 1618, for remission and mitigation of the forfeiture to the extent of its interest in the car, and the Attorney General denied its request. The Bank urged that the Attorney General's decision was reviewable by the District Court and that a failure to grant remission gives the Bank a counterclaim to recover the value of its interest in the property forfeited. The Bank asserted the violation of the due process and just compensation provisions of the Fifth Amendment. The District Court dismissed the counterclaim and found the Attorney General's denial of the Bank's claim for remission was unreviewable for lack of jurisdiction. The Court of Appeals affirmed.

FEDERAL JURISDICTION

Federal Jurisdiction over the forfeiture was conferred on the District Court by 28 U.S.C. 1355.



ARGUMENT

I.

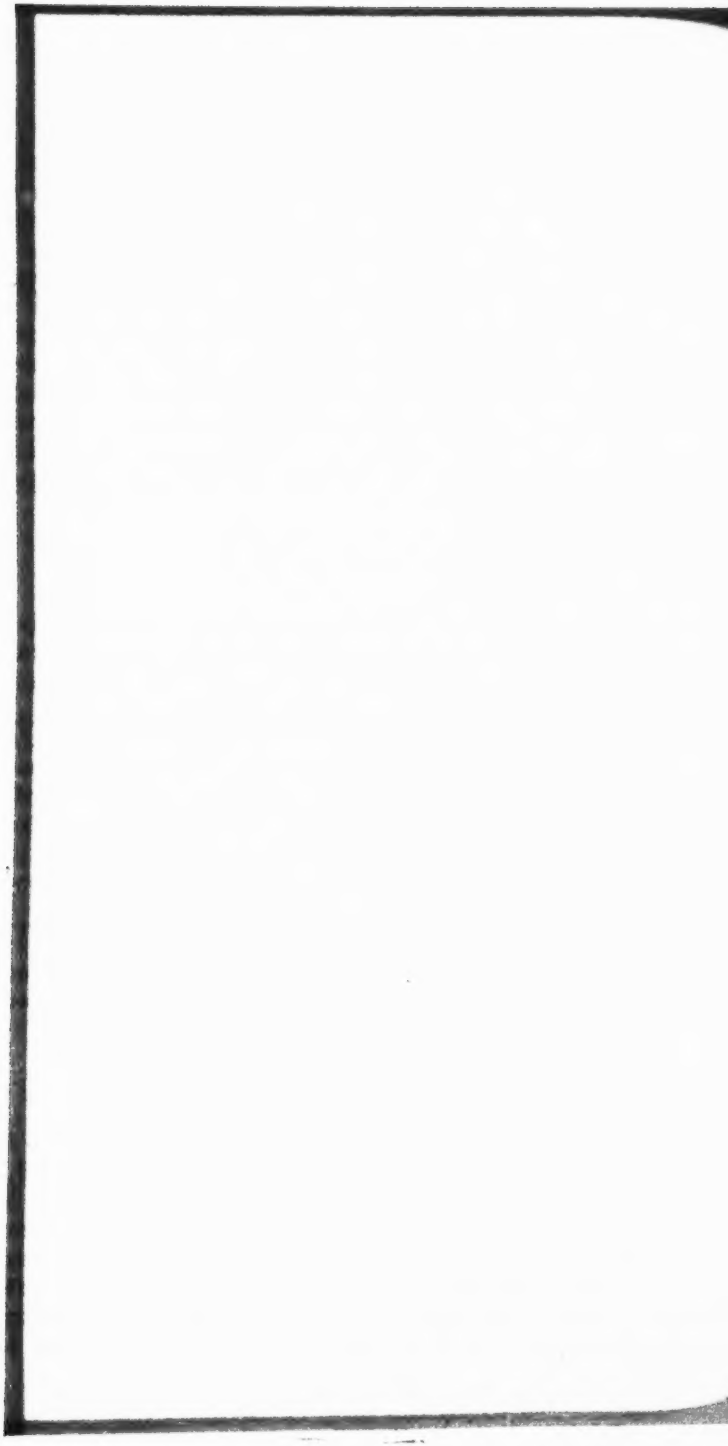
The Court of Appeals recognized in footnote (4) that agency action is unreviewable only in the exceptional case. The opinion has decided that Federal question in a way in conflict with the decisions of the Supreme Court mentioned in the footnote. In addition, PARLOU vs. COLLINGS 397 U.S. 159 25 L.Ed 2d 192 (1970) holds that the right of judicial review is ordinarily inferred where congressional intent to protect a certain class of persons can be shown. House Ways & Means Report No. 1054, 76th Congress states that the remedy for innocent owners, lienors and and mortgagees is to apply for remission and mitigation. This shows congressional intent to protect innocent owners, lienors and mortgagees.

II.

The Court of Appeals presumes jurisdiction under the Tucker Act, 28 U.S.C. 1346 (a) (2), and affirms the dismissal of the counterclaim for lack of jurisdiction. In U.S. vs. Emery, Bird, Thayer Realty Co., Ltd., 237 U.S. 28 (1915), Federal Jurisdiction was found under the Tucker Act to recover property taken under protest, these decisions are in conflict. The Bank is entitled to be heard on the merits to show that its interest in the car was forfeited without the Bank being willfully negligent under 19 U.S.C. 1618, in making the loan after conducting a thorough credit investigation of the automobile purchaser. In U. S. vs. One 1961 Red Chevrolet, 5 Cir. 457 F2d 1353 (1972), the Court found that under the Tucker Act is a remedy against the Government for the return of property forfeited in a manner repugnant to the Constitution.

III.

In the opinion on rehearing the Court of Appeals considers its decision wholly consistent with U. S. vs. U.S. Coin and Currency, 401 U.S. 715, 719-721 (1971). The Court of Appeals had decided that the refusal to remit or mitigate a forfeiture of the interest of the Bank is not repugnant to the Fifth Amendment for being a taking of private property without just compensation. The Supreme Court recognized in Coin & Currency the difficulty of reconciling the broad scope



of traditional forfeiture doctrine with the requirements of the Fifth Amendment. Unquestionably, the Bank could not have been prosecuted for the illegal transportation of contraband, therefore, the forfeiture should not punish the Bank.

The Attorney General's decision denying remission is based upon a requirement formally contained in 28 CFR 9.1 - 9.7, that the lender make an inquiry of the character of the borrower from a law enforcement agency. This requirement was eliminated from those regulations on February 4, 1972, after the decision by the District Court and before arguments were heard in the Court of Appeals. This change in regulations should be retroactive to protect the interest of the Bank.

CONCLUSION

WHEREFORE, petitioner requests that a Writ of Certiorari be issued to the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

FRED CLEGG STRONG,
Attorney for Petitioner

C E R T I F I C A T E

I certify three copies of the annexed petition have been served by mail by depositing the same in a United States Post Office, with first class postage prepaid addressed to:

Solicitor General
Department of Justice
Washington, D. C. 20530

, 1972.

FRED CLEGG STRONG

CORRECTED

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2545

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ONE 1970 BUICK RIVIERA BEARING
SERIAL NO. 494870H910774,
Respondent.

and

NATIONAL AMERICAN BANK OF NEW ORLEANS,
Claimant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(May 12, 1972)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

GODBOLD, Circuit Judge: This appeal is from a proceeding brought by the United States pursuant to

49 U.S.C.A. § 782 to enforce forfeiture of an automobile used to transport heroin in violation of 49 U.S.C.A. § 781.[1] The National Bank of New Orleans intervened in the forfeiture action as holder of a chattel mortgage and vendor's lien on the car, given as security for a loan made to the owner, Mrs. Myrtle Brooks, whose husband had used the car to transport heroin. The Bank alleged that it was innocent of any wrongdoing, that it had duly applied to the Attorney General, under 19 U.S.C.A. § 1618, for remission and mitigation of the forfeiture to the extent of its interest in the car, and that the Attorney General had denied its request. The Bank urged that the Attorney General's decision was reviewable by the District Court and that failure to grant remission would violate the due process and just compensation provisions of the Fifth Amendment. The District Court held that the Attorney General's denial of the Bank's claim for remission was unreviewable and found the Bank's constitutional arguments to be without merit. The Bank appeals and we affirm.

The question of our authority to review the Attorney General's denial of the request for remission of the forfeiture is controlled by the long-standing, judge-made rule that the Attorney General has unreviewable discretion over petitions under 19 U.S.C.A. § 1618.[2] *United*

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[1]Jurisdiction over the § 782 forfeiture proceeding was conferred by 28 U.S.C.A. § 1355.

[2]That statute provides:

§1618. Remission or mitigation of penalties

"Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty there-

States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964); *United States v. Kemp*, 186 F.2d 808 (10th Cir. 1951); *United States v. Gramling*, 180 F.2d 498 (5th Cir. 1950); *United States v. One 1957 Buick Roadmaster*, 167 F. Supp. 597 (E.D. Mich. 1958). *See also General Finance Co. of Louisiana v. United States*, 45 F.2d 380 (5th Cir. 1930) (denying review of an official adverse decision of a mitigation petition under the Tariff Act of 1922, 42 Stat. 987, 19 U.S.C.A. § 532, the pertinent part of which was couched in language identical to that now in 19 US.C.A. §1618); *United States v. Mellon*, 40 F.2d 808

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under, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs agent, collector, judge of the United States Customs Court, or United States commissioner, to take testimony upon such petition: *Provided*, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition."

By Executive Order No. 6166, (June 10, 1933) the Secretary's authority was transferred to the Attorney General in cases in which judicial proceedings are instituted. For simplicity, however, we refer to official action under this statute as being that of the Attorney General, even though some of the cases cited in text involve the Secretary.

(D.C. Cir. 1930) ("mandamus will not lie to control the discretionary action of the Secretary" under the Tariff Act of 1922, 42 Stat. 987, 19 U.S.C.A. § 532).

Judicial control of the Attorney General's remission and mitigation function has been exercised only when administrative officials have refused to entertain a mitigation claim on the erroneous belief that they had no statutory authority to do so, *Cotonificio Bustese, S.A. v. Morgenthau,* 121 F.2d 884 (D.C. Cir. 1941), and the extent of judicial control has been merely to require the officials to exercise jurisdiction over the claim, not to review the official decision of the merits.[3] Since the Bank does not claim that the Attorney General failed to exercise his discretion, we may not inquire further into the Attorney General's decision.[4]

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[3]A case analogous to Bustese is U.S. v. Edwards, 368 F.2d 722 (4th Cir. 1966), where the court assumed "the general validity of the proposition" that the denial of remission was unreviewable but remanded the case for development of the record, which contained facts tending to show a deliberate official policy of denying claims without any consideration — in other words, a refusal to exercise the discretion mandated by statute.

[4]Although we recognize that agency action is unreviewable only in the exceptional case, *see generally* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 28 L.Ed. 2d 136, 149-50 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 139-42, 18 L.Ed. 2d 681, 686-87 (1967), we do not write upon a clean slate. We find no instance where the Attorney General's discretion was subjected to judicial review; the full weight of authority lies on the other side.

The only feature that differentiates the Bank's claim from ones that have been made and rejected before is the use of an alternative source of subject matter jurisdiction, the Tucker Act, 28 U.S.C.A. § 1346(a)(2), as a vehicle to achieve review of the Attorney's General's decision. But even presuming that the Tucker Act's jurisdictional requirements are met, the

The Bank's due process and just compensation arguments are without merit. *Van Oster v. Kansas*, 272 U.S. 465, 71 L.Ed. 354 (1926); *Goldsmith, Jr.-Grant Co. v. U.S.*, 254 U.S. 505, 65 L.Ed. 376 (1921); *Associates Investment Co. v. U.S.*, 220 F.2d 885 (5th Cir. 1955)

The judgment of the District Court is AFFIRMED.

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answer on the merits of the Bank's claim for review under that jurisdictional head would be the same. *See* Heikkila v. Barber, 345 U.S. 229, 237, 97 L.Ed. 972, 978 (1953), (absence of authority to review under the Court's general equity powers follows "a fortiori" from absence of authority to review under 5 U.S.C.A. § 701).

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2545

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ONE 1970 BUICK RIVIERA BEARING
SERIAL NO. 494870H910774,
Respondent.

and

NATIONAL AMERICAN BANK OF NEW ORLEANS,
Claimant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 12, 1972, 5 Cir., 1972, ____ F.2d ____).

(June 23, 1972)

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

PER CURIAM: The contention is made that our decision ignores, overlooks and conflicts with *U.S. v. United States Coin & Currency,* 401 U.S. 715, 719-721 (1971). To the contrary, we considered then and we consider now that our decision is wholly consistent with *Coin & Currency,* which recognizes power in the Secretary of the Treasury to return property but "upon such terms and conditions as he deems reasonable and just."

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-255

NATIONAL AMERICAN BANK OF NEW ORLEANS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States commenced this action in the United States District Court for the Eastern District of Louisiana under 49 U.S.C. 782, seeking forfeiture of an automobile used to transport heroin, in violation of 49 U.S.C. 781. Petitioner intervened in the proceeding as holder of a chattel mortgage and vendor's lien on the car, which it had obtained as security for a loan made to the owner of the vehicle; the owner's husband had used the car to transport the heroin.

Petitioner alleged that it was innocent of any wrongdoing and had applied to the Attorney General, under 19 U.S.C. 1618, for remission of the forfeiture to the extent of its interest in the car. It sought re-

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view of the Attorney General's denial of remission and interposed a counterclaim seeking recovery under the Tucker Act, 28 U.S.C. 1346(a)(2).[1] The district court denied relief on the ground that the decision of the Attorney General whether to grant remission under 19 U.S.C. 1618 is a matter committed to the sole discretion of the Attorney General, and, once exercised, is not subject to judicial review.[2] The court of appeals affirmed (Pet. App. A 1–5).[3]

Petitioner's contentions in this Court that the Attorney General's determination is reviewable, and that the refusal to remit in this case denied its Fifth Amendment right to just compensation, are fully answered in the opinion below on which we principally rely here.

We note additionally that the Administrative Procedure Act, in providing for judicial review, is expressly inapplicable to agency action "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Remission of forfeiture is such discretionary action.

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[1] According to petitioner (Pet. 4), the Attorney General predicated his denial on the failure of petitioner to comply with the regulations requiring a lender first to make inquiry from a law enforcement agency of the character of the borrower (28 C.F.R. 9.1–9.7). Any subsequent change in the regulations (Pet. 4) would not excuse petitioner's non-compliance with the regulation in effect at the time.

[2] It is recognized that where the Attorney General fails to exercise his discretion at all, the courts may intervene (Pet. App. A 4).

[3] The court of appeals denied a petition for rehearing (Pet. App. B), rejecting petitioner's claim that *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719–721, is in conflict with the court's decision.

On the just compensation point, we add the following comments: While, as lienholder, petitioner was technically the legal owner of the vehicle, its interest was reversionary only; the vehicle served as security for the debt owed to it by the purchaser. The forfeiture did not extinguish this debt since, despite losing possession of the vehicle, the purchaser is still liable under the contract. It is this continuing liability, in fact, which gives the forfeiture statute its impact. See *United States* v. *One 1941 Pontiac Sedan*, 83 F. Supp. 999, 1000–1001 (S.D.N.Y.). When a forfeited vehicle is remitted to a lienholder, the purchaser's debt is thereby satisfied and his only loss is his equity in the vehicle—frequently minimal due to the vehicle's depreciation. Petitioner's real contention is thus that its claim against the vehicle as satisfaction of the purchaser's debt should be afforded legal precedence over the government's forfeiture claim. It is not a violation of the Fifth Amendment to deny a lienholder that precedence, especially where, as here, it failed to make the necessary inquiries when the debt was contracted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972